United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

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75-4077

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4077

RAUL FILMENTOR AGUILAR-CISNEROS,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Raul Filmentor Aguilar-Cisneros (the "petitioner", the "alien") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on March 26, 1975. That order dismissed the petitioner's appeal from the order of an Immigration Judge finding the alien deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1) in that he was excludable at entry as an immigrant not in possession of a valid immigrant visa or other entry document and was not exempted from the presentation thereof. Specifically, Aguilar-Cisneros entered the United States on or about December 3, 1972 at which time it was his intention to remain here indefinitely although he was not in possession of a valid immigrant visa or other entry document for such residence.

On April 24, 1975 Aguilar-Cisneros filed this petition for review alleging that the Board's decision was in violation of his rights under the Fourth and Fifth Amendments of the United States Constitution. Since the filing of this petition for review Aguilar-Cisneros has enjoyed the automatic stay of deportation provided by Section 106(a) of the Act, 8 U.S.C. § 1105a(a). He contends that the Board's order should be set aside because the deportation proceedings were initiated by an illegal arrest, search and seizure.

Issues Presented

1. Was the alien given a fair and impartial hearing in the deportation proceedings below.

2. Was the finding of deportability supported by clear, unequivocal and convincing evidence.

Statement of Facts

Raul Filmentor Aguilar-Cisneros is a native and citizen of Ecuador. He entered the United States on or about September 3, 1972 with the intention of obtaining employment and remaining here indefinitely. According to the alien's own testimony he effected his entry across the Mexican-American border without obtaining or presenting a visa or any proper entry documents. Specifically, while in Mexico the alien paid an unknown individual two hundred dollars ($200.) to be illegally transported across the border. Since the date of his entry the alien has been residing in the United States in violation of the immigration laws (R. 6 pp. 2-5).*

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* References preceded by the letter "R" are to the tabs affixed to the Certified Administrative Record filed with the Court.

Upon his apprehension the Immigration and Naturalization Service commenced deportation proceedings with the issuance of an Order to Show Cause and Notice of Hearing dated May 30, 1974 (R. 8). This order charged that Aguilar-Cisneros was not a citizen or national of the United States but rather a native and citizen of Ecuador who entered the United States in 1972 with the intention of remaining indefinitely in this country. The order further charged that at the time of his entry the alien was not in possession of a valid immigrant visa or other entry document and therefore he was deportable pursuant to Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1).

At the commencement of the deportation hearing on June 7, 1974 the Order to Show Cause was admitted as Exhibit #1. The alien, through his attorney, declined to admit the truth of the allegations charged in that order (R. 6, p. 1). Prior to the introduction of any evidence regarding the issue of deportability, the alien, by his attorney, moved to suppress any evidence illegally obtained by the Service and simultaneously moved to dismiss the deportation proceedings (R. 7). Written notice of these motions was introduced as Exhibit #2 of the deportation hearing. The Immigration Judge reserved decision on the motions and the Service Trial Attorney, over the objection of the attorney for the alien, was then permitted to examine the alien concerning the allegations contained in the Order to Show Cause. The alien testified that he was born in Ecuador, and that neither of his parents were citizens or nationals of the United States. He further testified that he had never been issued a visa for permanent residence in the United States and further described how he had surreptiously entered this country without the necessary immigration documentation and without inspection by immigration officials. Having established alienage and illegal entry into the United States the Service rested its examination of the alien (R. 6, pp. 2-5).

The Immigration Judge denied the motion to suppress the testimony of the alien and declined to subpoena the arresting immigration officials. Counsel for the alien was also directed as to the appropriate method of asserting a request under the Freedom of Information Act (R. 6, p. 6). In addition, the Immigration Judge examined the alien as to his eligibility for discretionary relief of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e) (R. 6, p. 8).

At the close of the deportation hearing the Immigration Judge entered a decision finding the alien deportable as charged, and ordered that the alien be granted the discretionary privilege of voluntary departure in lieu of enforced deportation. The Immigration Judge also entered an alternative order of enforced deportation should the alien fail to exercise the privilege of voluntary departure within the time authorized (R. 5). On June 12, 1974 the alien appealed the order of the Immigration Judge to the Board (R. 3, 4).

On March 26, 1975 the Board of Immigration Appeals rejected the alien's arguments and dismissed the appeal (R. 2). The Board found that the hearing was fair and that deportability had been established by clear, convincing and unequivocal evidence. The Board also affirmed the decision of the Immigration Judge denying the alien's motion to suppress.

Relevant Statute

Immigration and Nationality Act, Section 287 (8 U.S.C. § 1357):

> Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.
>
> (b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service;

and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18 United States Code.

Immigration and Nationality Act, Section 242 (8 U.S.C. § 1252):

Section 242 (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, ... In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. . . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent

with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

* * * * *

ARGUMENT

The alien was afforded his Fifth Amendment right of due process in the deportation proceedings below.

The petitioner has consistently, both in the administrative proceedings below and in this petition for judicial review of his order of deportation, rested his entire case upon an unsupported premise that his apprehension was the result of a warrantless and illegal arrest. Relying upon this supposition the petitioner seeks to overturn his deportation order on the basis that the evidence supporting the finding of deportability was inadmissible in that it was obtained in violation of the Fourth Amendment and was therefore "tainted." Specifically, the alien charges that the Immigration Judge erred in his refusal to conduct an evidentiary hearing on his self-styled motion to suppress illegally obtained evidence and therefore the alien's testimony was improperly admitted into evidence. Further, the alien charges that the Immigration Judge erred when he instructed the alien's counsel, an experienced attorney in immigration law, to properly file any requests for Service records pursuant to the applicable regulations, 8 C.F.R. § 103.10. It is respectfully submitted that the decision of the Immigration Judge rejecting these charges was factually well-founded and legally sound.

A. The nature of the petitioner's arrest does not, of itself, affect the validity of the deportation proceeding.

In the deportation proceedings below, and in the alien's brief for judicial review, his sole contention has been that his warrantless arrest was illegal and therefore all evidence of deportability should be suppressed. Quite simply, this premise is untenable. The statutory authority expressly granted to immigration officials pursuant to Section 287 of the Act, 8 U.S.C. § 1357 authorizes and speci-

fies the circumstances for the warrantless arrest of aliens who are illegally residing in the United States. This authority has repeatedly been upheld as a constitutionally permissible power to enforce the Immigration and Nationality Act. *Ojeda-Vinales* v. *Immigration and Naturalization Service*, Docket No. 74-2634 (2d Cir., decided September 23, 1975); *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau and Tit Tit Wong* v. *Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir), *cert. denied*, 404 U.S. 877 (1971). As noted by the Board, the alien in this case submitted no evidence tending to establish the illegality of his arrest. Furthermore, despite the fact that his notice of motion in the deportation proceedings below (R. 7) stated that the alien wished "to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, search and seizure," this testimony was never forthcoming. Clearly, on a motion to suppress, the party raising the claim has the burden of establishing that the evidence challenged was unlawfully obtained. *Nardone* v. *United States*, 308 U.S. 338 (1939). Furthermore, assuming arguendo that the exclusionary rule of criminal proceedings is applicable to a civil deportation proceedings, the Immigration Judge was not required as a matter of law to hold an evidentiary hearing where the alien's moving papers did not state sufficient facts which if proven would have required granting the relief requested by the alien. *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir. 1969). Not only did the alien's moving papers (R. 7) fail to recite the "barest factual allegations", they were completely devoid of any allegations which might tend to cast doubt on the legality of the alien's arrest. The paucity of the administrative record in this respect is solely related to the refusal by the alien's attorney to examine the petitioner and develop such a record. See *Huerta-Cabrera*

v. *Immigration and Naturalization Service*, 466 F.2d 759, 761 (7th Cir. 1972); See also, *Shu Fuk Cheung* v. *Immigration and Naturalization Service*, 476 F.2d 1180, 1181 (7th Cir. 1973).

Finally, although the Government does not dispute that the Fourth Amendment protects aliens as well as citizens, *United States* v. *Brigoni-Ponce*, — U.S. —, 43 U.S.L.W. 5028; *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), it is respectfully submitted that the exclusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1913) precludes the use of evidence obtained in violation of the Fourth Amendment in *criminal* proceedings against the victim of the illegal search and seizure and is inapplicable to deportation proceedings such as the case at bar. Deportation proceedings have consistently been held to be civil in nature and not the equivalent of criminal proceedings. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Papapil* v. *Immigration and Naturalization Service*, 424 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 908 (1970). While an alien is entitled to due process in the deportation proceedings, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1949) the proceedings are not subject to the constitutional safeguards required in criminal proceedings. *Abel* v. *United States*, 362 U.S. 217 (1966). See *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975) (failure to give *Miranda* warnings does not render alien's statement made during custodial interrogation inadmissible in deportation proceedings); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923) (presumption of innocence does not apply in immigration proceedings); *Nason* v. *Immigration and Naturalization Service*, 370 F.2d 865 (2d Cir. 1967) (no right to counsel at preliminary investigation before immigration investigators); *Bridges* v. *Wixon*, 144 F.2d 927 (C.C.A. Cal.) *reversed on other grounds*, 326 U.S. 135 (1945) (double jeopardy inapplicable to deportation proceedings).

Furthermore, the extension of the application of the exclusionary principle to a purely civil proceeding runs counter to the analytical framework adopted by the Supreme Court in *United States* v. *Calandra*, 414 U.S. 338 (1974), wherein the Court described the exclusionary rule as,

> "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought to be most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use evidence to *incriminate* the victim of the unlawful search. (Citations omitted) This standing rule is premised on a recognition that *the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.*" (Emphasis added) *Id.* at 348.

In declining to apply the exclusionary rule to grand jury proceedings the Court noted that the broad dictum of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), often relied upon for extending the exclusionary rule, had been "substantially undermined by later cases." *Id.* at 352-353, n.3. Although the consequences of deportation may be severe in individual cases, *Costello* v. *Immigration and Naturalization Service*, 376

U.S. 120, 128 (1964) the purpose of expulsion is not to penalize the alien for an offense against the law, but rather to regulate the procedure for the immigration of aliens into the United States in accordance with the structured system created by Congress, pursuant to its plenary power over immigration matters as set forth in the Immigration and Nationality Act. Compare, *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (forfeiture was clearly a penalty for the criminal offense and was quasi-criminal in nature).

Regardless, in the instant case, where the only evidence supporting the finding of deportation is the admissions of the alien, and where no evidence derived from an illegal search has been relied upon to support the administrative ruling, the exclusionary rule of the Fourth Amendment is clearly inapplicable. *Guzman-Flores* v. *Immigration and Naturalization Service*, 496 F.2d 1245, 1247 (7th Cir. 1974). Compare *Almeida-Sanchez* v. *United States*, *supra*. Even if the arrest of the alien were illegal, an assumption which finds no support in the record, the mere fact that the authorities may have obtained custody of the "body" of the alien illegally does not render the deportation proceeding illegal as the "fruit of the poisoned tree." *Guzman-Flores* v. *Immigration and Naturalization Service*, *supra*, at p. 1248.

It is therefore submitted that the Immigration Judge's denial of the motion to suppress and his refusal to conduct an evidentiary hearing on that issue was proper.

Finally, the alien's charge of error relating to a "Freedom of Information Act" demand is clearly insubstantial. Counsel was properly directed to the appropriate administrative regulations relating to the disclosure of Service records. If counsel seriously decided to make a request pursuant to 5 U.S.C. § 552 he should have done so in accordance with the applicable statutory procedures and applicable administrative regulations. 8 C.F.R. § 103. Clearly the Immigration Judge did not err in directing the alien to the proper forum.

B. The Immigration Judge properly admitted the alien's admissions of alienage and illegal entry into evidence and the order of deportation was based upon clear, unequivocal, and convincing evidence.

The petitioner complains that the deportation proceedings should have been terminated for failure of proof. In support of that argument he charges that his testimony was inadmissible and that the Government failed in its burden of proving the time, place and manner of entry into the United States. Both contentions are untenable.

At no time during the deportation hearing did the alien interpose an objection based upon his Fifth Amendment right against self-incrimination. As previously mentioned, this proceeding was a civil administrative action with no contemplation apparently being given to seeking criminal sanctions against the alien. In the absence of a Fifth Amendment objection the alien has no right to remain silent and refuse to answer questions regarding his alienage and entry during the deportation proceedings. *Chavez-Raya* v. *Immigration and Naturalization Service*, *supra* at 401; *Laqui* v. *Immigration and Naturalization Service*, 422 F.2d 807 (7th Cir. 1970); *Loufakis* v. *United States*, 81 F.2d 966 (3d Cir. 1936); see also *Henriques* v. *Immigration and Naturalization Service*, 465 F.2d 119, n.2 (2d Cir. 1972). In fact the alien's silence during this examination in the absence of a Fifth Amendment privilege could be used as the basis for drawing an adverse inference against him. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153-54 (1923). Therefore, the examination of the alien in the deportation proceeding below was proper.

Finally, the petitioner is obviously wrong in describing the burden of proof under Section 291 of the Act, 8 U.S.C. § 1361. That statute clearly states that the burden is upon the alien to show the time, place, and manner of his entry.

CONCLUSION

The alien was given a fair and impartial hearing wherein he had ample opportunity to give evidence on his own behalf, as well as to make any showing regarding the legality of his stay in this country. His testimony clearly demonstrates that he was deportable as charged. The decision of the Immigration Judge, affirmed by the Board of Immigration Appeals, is based upon clear, unequivocal and convincing evidence which was properly considered in reaching that decision. This petition for review should be dismissed.

Dated: New York, New York
November, 1975

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4077

Pauline P. Troia, being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of November 1975 he served a copy of the within

respondent's brief

by placing the same in a properly postpaid franked envelope addressed:

Oltarsh, Flattery & Oltarsh, Esqs.,
225 Broadway
New York NY 10007

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, annex, ~~Foley Square~~, Borough of Manhattan, City of New York.
One St. Andrews Plaza

/s/

Sworn to before me this

7th day of November 19 75

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977